

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

August 24, 2005

Honorable John G. Roberts, Jr.
E. Barrett Prettyman Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Judge Roberts:

We look forward to your upcoming confirmation hearing, when the Senate and the public will have an opportunity to hear more about your qualifications and judicial philosophy.

Recently, a matter has arisen that we believe you need to address directly before the hearing. That matter concerns your continued participation as a D.C. Circuit judge in the case of *Hamdan v. Rumsfeld*, while you were being interviewed by President Bush, Vice President Cheney, Attorney General Gonzales, Deputy Chief of Staff Karl Rove, White House Counsel Harriet Miers, and others, for possible nomination to the Supreme Court.

As you disclosed in your written responses to the Judiciary Committee's questionnaire, you had an interview with Attorney General Gonzales a week before the *Hamdan* appeal was argued and at least two more interviews with White House officials between the argument and the release of panel's opinion on July 15, 2005. It was President Bush, of course, who designated Hamdan for a military commission trial after his capture in Afghanistan in 2001. And it is Attorney General Gonzales's Justice Department that represents the defendants in the case. In addition, the Attorney General's opinion when he was Counsel to the President on the applicability of the Geneva Conventions to participants in the conflict with the Taliban was directly at issue in the case.

Because of the timing of your interviews and court's consideration of the *Hamdan* case, several leading legal ethicists, including Professor Stephen Gillers of New York University Law School, have recently suggested that you should have recused yourself from the case while you were being considered for the Supreme Court and that the failure to do so may well have violated the federal judicial recusal statute, 28 U.S.C. § 455(a).

It is clear that you have long understood the ethical issues raised by continuing to work on a case in which a party is considering you for another

position. For example, you recently recused yourself from a case involving the American Bar Association (ABA), presumably because the ABA was formally evaluating you as a nominee for the Supreme Court. Similarly, as far back as 1986, when you worked in the White House Counsel's Office, you recused yourself from working on an issue raised by a Washington lawyer because of "pending discussions with [the lawyer's] firm concerning possible future employment."

We request that you respond to the following questions prior to the hearing:

1. Why did you believe it was appropriate to continue participating in the *Hamdan* case while being interviewed for a vacancy on the Supreme Court?
2. Prior to your nomination, did you conduct research or receive advice on the propriety of continuing to be part of the panel in *Hamdan*? If so, from whom, and please provide copies of documents reflecting that advice.
3. After your nomination, have you discussed the propriety of your decision not to recuse yourself from the *Hamdan* case with anyone? If so, with whom, and please provide copies of any documents that reflect such discussions or that have been provided to you in connection with preparing to respond to questions on this matter.
4. Please amplify your response to Question 22 from the Judiciary Committee's questionnaire, which asked about your approach to conflicts of interest. Specifically, please provide a description of all other occasions where you thought it was appropriate to recuse yourself from cases assigned to you.

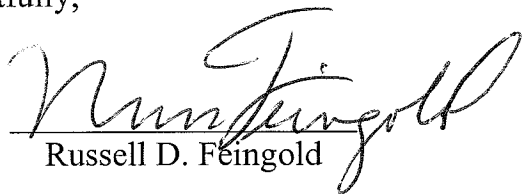
Given the circumstances, we believe the Committee and the public would benefit from a fuller explanation of your actions prior to your hearing. We will then be better able to determine whether further questions during the hearing will be necessary.

Thank you for your attention to this matter.

Respectfully,



Charles E. Schumer



Russell D. Feingold

cc: Senator Arlen Specter
Chairman, Committee on the Judiciary

Senator Patrick J. Leahy
Ranking Member, Committee on the Judiciary
